

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

FIRST NIAGARA RISK MANAGEMENT,
INC.,

Plaintiff,

18mc75
ELECTRONICALLY FILED

v.

JOHN A. FOLINO,

Defendant.

**MEMORANDUM ORDER TRANSFERRING PLAINTIFF'S
MOTION TO COMPEL (DOC. NO. 1)
TO THE EASTERN DISTRICT OF PENNSYLVANIA**

Plaintiff First Niagara Risk Management, Inc. ("FNRM" or "Plaintiff") filed the instant Motion to Compel Eugene Tempesta, Esq.'s Compliance with a Subpoena to Testify at a Deposition in a Civil Action and Subpoena Duces Tecum. Doc. No. 1. Mr. Tempesta, a non-party to the underlying litigation, resides in the Western District of Pennsylvania, and therefore compliance with the subpoena must occur within the Western District of Pennsylvania pursuant to Federal Rule of Civil Procedure 45.

The Subpoena relates to an action pending in the Eastern District of Pennsylvania, *First Niagara Risk Management, Inc. v. John A. Folino*, Civil Action No. 16-1779 ("the Eastern District Litigation"). In the Eastern District Litigation, FNRM alleges that Mr. Folino, a former executive, breached his fiduciary duty of loyalty for FNRM, tortiously interfered with customers and prospective customers of FNRM, and breached the restrictive covenants in his Employment Agreement. Doc. No. 2. FNRM alleges that Mr. Tempesta, an attorney, assisted Mr. Folino to establish a competing business during Mr. Folino's employment with FNRM, and therefore seeks, *inter alia*, communications between Mr. Tempesta and Mr. Folino related to FNRM

clients that FNRM alleges were “siphoned” away from FNRM to Mr. Folino’s newly established competing business. [Doc. No. 2](#).

FNRM initially filed this Motion to Compel in the Eastern District Litigation. However, the Honorable Judge Slomsky informed the Parties that he did not believe he had jurisdiction to decide the Motion to Compel and granted FNRM time to permit FNRM to properly file the motion in the Western District of Pennsylvania. [Doc. No. 2](#), FN1. For the reasons that follow, this Court will transfer the Motion to Compel to the Eastern District of Pennsylvania pursuant to Federal Rule of Civil Procedure 45(f), which permits the court where compliance with a subpoena is required to transfer a motion to the issuing court if there are exceptional circumstances. Fed. R. Civ. P. 45(f).

The Advisory Notes to Rule 45(f) (2013 Amendment) provide that:

The prime concern should be avoiding burdens on local nonparties subject to subpoenas, and it should not be assumed that the issuing court is in a superior position to resolve subpoena-related motions. In some circumstances, however, transfer may be warranted in order to avoid disrupting the issuing court’s management of the underlying litigation, as when that court has already ruled on issues presented by the motion or the same issues are likely to arise in discovery in many districts.

Here, although fact discovery is closed in the Eastern District Litigation, Judge Slomsky has recently ordered the Defendant to produce certain documents for *in camera* review, including email communications between Defendant and Mr. Tempesta. *See* Eastern District Litigation, 2:16cv1779, Doc. Nos. 68-1 and 88.

The dispute between the Parties regarding discovery of information related to Mr. Tempesta has already been the subject of several motions and conferences with Judge Slomsky. As such, there is some risk that a ruling by this Court on the substance of FNRM’s Motion to Compel Mr. Tempesta’s compliance with the Subpoena could result in a ruling inconsistent with

Judge Slomsky's forthcoming rulings regarding these closely related discovery matters. Further, Judge Slomsky has set trial in this matter for April 13, 2018 and is best situated to manage these ongoing discovery issues so as not to disrupt the case management schedule entered in this case. Finally, the Court also finds that transferring this motion to Judge Slomsky will not burden Mr. Tempesta.

Accordingly, FNRM's Motion is TRANSFERRED to the Eastern District of Pennsylvania for adjudication by the trial judge presiding over the matter captioned *First Niagara Risk Management, Inc. v. John A. Folino*, 2:16cv1779, pursuant to Federal Rule of Civil Procedure 45(f).

SO ORDERED, this 26th day of January, 2018

s/Arthur J. Schwab
Arthur J. Schwab
United States District Judge